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8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

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11 JACK BUCKHORN and ANISA M.)
12 THOMSEN, as TRUSTEES, et)
13 al.,) No. C 08-4004 BZ
14 Plaintiff(s),)
15 v.)
16 MARK A. KNEAPER,)
17 Defendant(s).)

)

**REPORT AND RECOMMENDATION ON
PLAINTIFFS' MOTION FOR ENTRY
OF DEFAULT JUDGMENT**

18 Plaintiffs Jeff Buckhorn and Anisa Thomsen (collectively,
19 "plaintiffs"), acting as trustees for Redwood Empire
20 Electrical Workers Health and Welfare Trust Fund, Redwood
21 Empire Electrical Workers Pension Trust, Joint Electrical
22 Industry Training Program, National Employees Benefit Fund,
23 and Redwood Empire Electrical Workers Work Recovery Fund
(collectively, "the funds"), have applied for entry of default
25 judgment against defendant Mark A. Kneaper ("defendant"),
26 individually and doing business as Kneaper Electric.
Defendant has not appeared in this action and did not respond
28 to plaintiffs' application. Defendant has not consented to my

1 jurisdiction pursuant to 28 U.S.C. § 636(c). This matter will
2 therefore be reassigned to a District Judge with the following
3 report and recommendation.

4 A court may not enter a default judgment against an
5 unrepresented minor, an incompetent person, or a person in
6 military service. Fed. R. Civ. P. 55(b)(2); 50 U.S.C. App.
7 § 521. Though admonished to comply with this requirement by
8 Order dated May 18, 2009, plaintiffs did not. Following the
9 hearing at which this failure was discussed, plaintiffs'
10 attorney submitted an affidavit stating that "[d]efendant is
11 not an infant or incompetent" and "[d]efendant is not in the
12 military service" The affidavit, however, does not
13 provide any foundation or factual basis for these assertions,
14 and therefore fails to comply with the requirements of 50
15 U.S.C. App. § 501 *et seq.* See United States v. Simmons, 508
16 F. Supp. 552 (E.D. Tenn. 1980). Because plaintiffs have
17 failed to comply with the requirements of the Service Members'
18 Relief Act, I **RECOMMEND** that the Court deny plaintiffs'
19 request for entry of default judgment. In the event, however,
20 that plaintiffs file a supplemental affidavit that complies
21 with the Service Members' Relief Act, I have issued the
22 following report and recommendation for entry of default
23 judgment.

24 On August 20, 2008, plaintiffs filed a complaint under
25 section 515 of the Employee Retirement Income Security Act of
26 1974 ("ERISA"), 29 U.S.C. § 1132, alleging that defendant
27 violated a collective bargaining agreement by failing to make
28 required contributions to the funds. The complaint, which was

1 amended on January 20, 2009, seeks unpaid contributions from
2 August 2008 to December 2008, plus liquidated damages,
3 interest, audit fees, and attorney's fees and costs, pursuant
4 to U.S.C. § 1132(g)(2).

5 Plaintiffs personally served process on defendant on
6 September 10, 2008, and did so again on February 10, 2009,
7 after plaintiffs filed an amended complaint. Defendant failed
8 to answer or otherwise defend this action. On March 20, 2009,
9 upon plaintiffs' request, the clerk of this court entered
10 defendant's default under Rule 55(a). By its default,
11 defendant is deemed to have admitted the well-pleaded
12 averments of the complaint except those as to the amount of
13 damages. See Fed. R. Civ. P. 8(d), TeleVideo Systems, Inc. v.
14 Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

15 Pursuant to Rule 55(b)(2), the Court may enter a default
16 judgment against a party against whom default has been
17 entered. The decision to grant or deny a default judgment
18 under Rule 55(b) is within the discretion of the Court. Eitel
19 v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Although a
20 formal hearing is not required for a court to render a default
21 judgment, Davis v. Fendler, 650 F.2d 1154 (9th Cir. 1981),
22 plaintiffs have the burden of proving damages through
23 testimony, written affidavit, or other relevant evidence. See
24 Bd. of Trs. of the Boilermaker Vacation Trust v. Skelly, Inc.,
25 389 F. Supp. 2d 1222, 1226 (N.D. Cal. 2005).

26 In their motion, plaintiffs seek damages totaling
27 \$144,568.52 for unpaid contributions, liquidated damages,
28 interest and audit costs; costs of litigation totaling

1 \$971.00; and attorneys' fees totaling \$9,233.00. (Mot. For
2 Def. J. p. 1.) Liability for unpaid delinquent contributions
3 having been established on default, the remaining issue is the
4 relief available to plaintiffs.

5 Section 1132(g) of ERISA provides that in an action to
6 enforce payment of delinquent contributions:

7 the court shall award the plan -
8 (A) the unpaid contributions,
9 (B) interest on the unpaid contributions,
10 (C) an amount equal to the greater of -
11 (I) interest on the unpaid contributions,
12 or
13 (ii) liquidated damages provided for under
14 the plan in an amount not in excess of 20
15 percent. . . of the amount determined by the
16 court under subparagraph (A),
17 (D) reasonable attorney's fees and costs.

18 U.S.C. § 1132(g)(2). An award under section 1132(g)(2) is
19 mandatory if: "(1) the employer is delinquent at the time the
20 action is filed; (2) the district court has entered a judgment
21 against the employer; and (3) the plan provides for such an
22 award." Northwest Adm'rs, Inc. v. Albertson's, Inc., 104 F.3d
23 253, 257 (9th Cir. 1996) (citing Idaho Plumbers and
Pipefitters Health and Welfare Fund v. United Mechanical
Contractors, Inc., 875 F.2d 212, 215 (9th Cir. 1989)).

24 Plaintiff has satisfied the statutory requirements and is
25 entitled to an award under section 1132(g). See Iron Workers
26 Dist. Council v. Hudson Steel Fabricators & Erectors, Inc., 68
27 F.3d 1502, 1507 (W.D.N.Y. 1995).

28 In an action to enforce payment of delinquent
29 contributions under § 1132(g)(2), the proper award must be
based on the amount of contributions that were delinquent at
the time of suit, even if the defendant tendered the unpaid

1 contributions prior to judgment. See Northwest Adm'rs, 104
2 F.3d at 258 (quoting Carpenters Amended and Restated Health
3 Benefit Fund v. John W. Ryan Constr. Co., Inc., 767 F.2d 1170,
4 1175 (5th Cir. 1985)) ("[M]andatory fees are available under §
5 1132(g)(2) 'notwithstanding the defendant's post-suit, pre-
6 judgment payment of the delinquent contributions
7 themselves.'"); see also Iron Workers Dist. Council, 68 F.3d
8 at 1507 ("[T]he amount of an award of interest or liquidated
9 damages should logically be predicated upon the amount of the
10 unpaid contributions originally at issue, whether or not
11 outstanding at the time of judgment, since that amount
12 correctly measures the damage caused by the delinquency.");
13 Board of Trustees of the Sheet Metal Workers v. General
14 Facilities, Inc., 2003 WL 1790837, *2 (N.D. Cal. Mar. 31,
15 2003) (citing Carpenters & Joiners Welfare Fund v. Gittleman
16 Corp., 857 F.2d 476, 478 (8th Cir. 1988)) ("Section 1132
17 provides for liquidated damages as a percentage of 'unpaid
18 contributions' and courts have interpreted 'unpaid
19 contributions' to mean contributions owing and unpaid at the
20 time the lawsuit is filed.").

21 To prove their damages, plaintiffs submitted the
22 declaration of Alice Marshall, the administrator for Redwood
23 Empire Electrical Workers. Marshall's declaration ("Marshall
24 Decl.") includes monthly payroll reports as well as a chart
25 breaking down the damages requested. Marshall's declaration
establishes that, from August 2008 to December 2008, defendant
did not pay contributions in the amount of \$107,771.75. (See
26 Marshall Decl. Exh. C.) I recommend that plaintiffs recover
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1 this amount from defendant.

2 Plaintiffs also request interest in the amount of 10% per
3 annum, as provided for in Section 6.01 of the collective
4 bargaining agreement, amounting to a total of \$7,674.62.
5 (Marshall Decl. Exh. E.) Under section 1132(g)(2)(B),
6 plaintiffs may recover interest on unpaid contributions. 29
7 U.S.C. § 1132(g)(2)(B). Interest is calculated based on the
8 rate provided for under the plan. Id. Plaintiffs have
9 established that they are entitled to \$7,674.62 in interest
10 and I recommend they recover this amount.

11 Plaintiffs also seek \$18,918.15 in liquidated damages,
12 calculated at a rate of twenty percent (20%) of the amount due
13 for payments made subsequent to the remittance period.

14 (Marshall Decl. Exh. D.) Section 1132(g)(2)(C) permits
15 liquidated damages in an amount not to exceed twenty percent
16 (20%) of the total of the unpaid contributions, and the
17 collective bargaining agreement in this case also provides
18 that plaintiffs may recover twenty percent (20%) of the amount
19 due as liquidated damages. Because the amount of liquidated
20 damages requested by plaintiffs is permitted by both contract
21 and statute, I recommend that plaintiffs recover \$18,918.15 in
22 liquidated damages from defendant.

23 Finally, plaintiffs seek \$9,233.00 in attorneys' fees and
24 \$971.00 in costs. Reasonable attorneys' fees and costs of
25 action may be awarded to a Trust Fund or Employee Benefit Plan
26 that receives a judgment in its favor. 29 U.S.C. §
27 1132(g)(2)(D). Plaintiffs submitted the declaration of Sue
28 Campbell ("Campbell Decl."), the funds' collection attorney,

1 to support their request. (See Campbell Decl. Ex. A.)
2 Campbell's declaration includes invoices itemizing attorneys'
3 fees for the case. Campbell calculates her billing at a rate
4 of \$195.00 per hour for this matter, and the invoices provided
5 demonstrate that Campbell spent approximately 44 hours working
6 on this action. Campbell's time consisted of, *inter alia*,
7 reviewing records; reviewing the auditor's report;
8 participating in telephone conferences; filing stop notices
9 and taking other steps to collect unpaid amounts; preparing
10 what Campbell refers to as "delinquent correspondence"; and
11 preparing the Motion for Entry of Default and the instant
12 motion. The amount of time expended and the billing rate are
13 reasonable given the work performed. I recommend that
14 plaintiffs recover these amounts for the attorney's fees and
15 costs.

16 For the foregoing reasons, I **RECOMMEND** that judgment be
17 entered in plaintiffs' favor for a total award of \$144,568.52,
18 comprised of \$107,771.75 in unpaid contributions, \$18,918.15
19 in liquidated damages, \$7,674.62 in interest, \$9,233.00 in
20 attorney's fees, and \$971.00 in costs, so long as plaintiffs
21 satisfy the Service Members' Relief Act.

22 Dated: June 25, 2009

23 
24 Bernard Zimmerman
United States Magistrate Judge

25 G:\BZALL\BZCASES\BUCKHORN V. KNEAPER\REPORT AND RECOMMENDATION.wpd

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